Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin (No 2)

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–183 OF 1991
MAHADEV SHANKAR J
2 OCTOBER 1996

Islamic Law *— Jurisdiction — High Court — Fraudulent disposal of properties to defeat legitimate rights of beneficiaries — Letters of administration fradulently obtained from High Court — Whether High Court had exclusive jurisdiction to declare letters of administration fraudulent — Claim for compensation against defendant's assets for wrongful disposal of deceased's property — Suit filed prior to coming into force of Administration of Islamic Law Enactment Selangor No 2 of 1989 — Whether action was for tort, conversion and breach of trust, and not claim for 'division and inheritance' — Whether Syariah Court would have exclusive jurisdiction — Whether issue of jurisdiction should be allowed at appellate stage — Administration of Islamic Law Enactment Selangor No 2 of 1989 — Federal Constitution art 121(1A)*

The late Ainuddin ('the deceased') had two wives, three sons and three daughters. The defendant was his eldest son. In fraud of these daughters, of whom the plaintiff was one, and in fraud of the High Court of Malaya, the defendant wilfully suppressed the existence of the three daughters as beneficiaries of his father's estate when applying for letters of administration in 1947 and when obtaining the distribution order made on 31 October 1949 ('the distribution order'). The defendant and his brothers arranged matters between them so that they ended up owning all the deceased's lands between them. The fraud was only discovered much later. By then the defendant had already sold that portion of the land he acquired from his father's estate. The plaintiff filed an action against the defendant on 21 June 1991. The cause of action pleaded was that the defendant had committed an actionable fraud by deceiving the court into believing that the plaintiff did not exist and then fraudulently disposing the deceased's properties in such manner as to defeat the legitimate rights of the plaintiff. Since the original properties had all been distributed, the relevant prayers were for damages. The High Court allowed the plaintiff's claim. The defendant appealed. A written notice was given that the defendant proposed to submit at the hearing of the appeal that this matter was outside the jurisdiction of the High Court of Malaya pursuant to art 121(1A) of the Federal Constitution ('the Constitution') but was instead within the ambit of the Syariah Court.

Held:

(1) Where an order of the High Court had been obtained by fraud, it was within the exclusive jurisdiction of this court to declare that to be so. The Syariah Court was not so vested with the jurisdiction to set aside orders made by the High Court (see p 743F–G).

(2) This action was not brought against the defendant in his capacity as administrator. It was brought against him for damages and restitution in his personal capacity for his tortuos acts in converting his sister's property to his own use, thereby committing a breach of trusts. In the Trustee Act 1949 ('the Act'), s 2 specifically applies the Act to administratorships constituted or created before or after the commencement of the Act on 31 December 1949. The 'court' vested with jurisdiction to deal with breaches of trust by s 3 of the Act is the High Court of Malaya (see p 743H–I).

(3) Neither art 121(1A) of the Constitution nor the Administration of Islamic Law Enactment Selangor No 2 of 1989 ('the 1989 Enactment') is invested with retrospective effect. The 1989 Enactment has no application to this action which was properly filed before it came into force on 1 September 1991. But even on assumption that the 1989 Enactment applied, there are other hurdles which the defendant could not surmount. Section 42(2)(b)(viii) of the 1989 Enactment requires the Syariah High Court in its civil jurisdiction to hear and determined all actions in which all the parties are Muslims and which relates to 'division and inheritance of non-will property'. The plaintiff's claim was not for 'division and inheritance'. It was a claim for compensation against the defendant's personal assets which he had bought with resources obtained from non-will property he had wrongfully disposed of in 1950 (see pp 745F–H, I–746A).

(4) Sections 31, 35 and 46 of the 1989 Enactment recognize that the jurisdiction of the Syariah Court and the civil courts, far from being mutually exclusive, are in fact symbiotic since they provide the machinery whereby the opinion of the Mufti or the Syariah Court can be effectively implemented by the civil court acting within its jurisdiction. Article 121(1A) of the Constitution does not say and should not be understood to mean that all disputes in which all the parties are Muslim should only be heard in the Syariah Court (see p 747G–I).

(5) Inevitably the question of jurisdiction has to be decided in the first instance in and by the court where the action has been filed. Any suggestion that the court does not have jurisdiction must be raised at the earliest possible opportunity. Unless it is manifestly obvious that the civil court never had any jurisdiction at all by virtue of art 121(1A) of the Constitution, in a civil case a party should not be permitted to argue at the appellate stage that the court of first instance did not have jurisdiction (see p 748B–C).

[Bahasa Malaysia summary

Mendiang Ainuddin ('si mati') mempunyai dua orang isteri, tiga anak lelaki dan tiga anak perempuan. Defendan merupakan anak lelaki

sulungnya. Dengan niat menipu anak-anak perempuan ini, yang mana plaintif merupakan salah seorang darinya, dan dengan niat menipu Mahkamah Tinggi Malaya, defendan dengan sengajanya menyembunyikan kewujudan tiga anak perempuan sebagai benefisiari harta pusaka ayahnya semasa memohon surat pentadbir pada tahun 1947 dan semasa memperolehi perintah pengagihan yang dibuat pada 31 Oktober 1949 ('perintah pengagihan tersebut'). Defendan dan adik-adiknya membuat peraturan di antara mereka supaya mereka memiliki segala tanah si mati sesama diri mereka. Fraud tersebut hanya diketahui kemudian. Pada masa itu defendan telah pun menjual bahagian tanah yang telah diperolehi dari harta pusaka ayahnya. Plaintif memfail satu tindakan terhadap defendan pada 21 Jun 1991. Kausa tindakan yang diplidkan adalah bahawa defendan telah melakukan satu perbuatan fraud yang boleh didakwa dengan memperdayai mahkamah supaya mempercayai bahawa plaintif tidak wujud dan kemudiannya melupuskan hartanah si mati mengikut cara yang menewaskan hak-hak sah plaintif. Memandangkan semua hartanah asal telah diagihkan, permohonan yang relevan adalah untuk ganti rugi. Mahkamah Tinggi membenarkan tuntutan plaintif. Defendan merayu. Satu notis bertulis telah diberikan bahawa defendan bercadang menghujah di pembicaraan rayuan bahawa perkara ini terletak di luar bidang kuasa Mahkamah Tinggi Malaya menurut perkara 121(1A) Perlembagaan Persekutuan ('Perlembagaan') tetapi sebaliknya dalam lingkungan kuasa Mahkamah Syariah.

Diputuskan:

(1) Di mana satu perintah Mahkamah Tinggi telah diperolehi melalui fraud, adalah dalam lingkungan bidang kuasa eksklusif mahkamah ini untuk mengisytihar serdemikian. Mahkamah syariah tidak dikurniakan dengan bidang kuasa sedemikian untuk mengetepikan perintah yang dibuat oleh Mahkamah Tinggi (lihat ms 743F–G).

(2) Tindakan ini tidak dibawa terhadap defendan dalam keupayaannya sebagai pentadbir. Ia dimulakan terhadapnya untuk ganti rugi dan pengembalian dalam keupayaan peribadinya untuk perbuatan tortnya dalam mengubah hartanah adik perempuannya untuk kegunaannya sendiri, dan dengan cara itu melakukan pecah amanah. Dalam Akta Pemegang Amanah 1949 ('Akta tersebut'), s 2 memakai Akta tersebut secara khusus kepada pentadbiran yang dibentuk atau diwujudkan sebelum atau selepas pemulaan Akta tersebut pada 31 Disember 1949. 'Mahkamah' yang dikurniakan bidang kuasa untuk menguruskan pecah amanah oleh s 3 Akta tersebut merupakan Mahkamah Tinggi Malaya (lihat ms 743H–I).

(3) Baik perkara 121(1A) Perlembagaan mahupun Enakmen Pentadbiran Undang-Undang Islam Selangor No 2 tahun 1989

('Enakmen 1989') tidak dikurniakan dengan kesan kebelakangan. Enakmen 1989 tidak terpakai kepada tindakan ini yang difailkan dengan wajarnya sebelum ia berkuatkuasa pada 1 September 1991. Namun biarpun mengandaikan bahawa Enakmen 1989 terpakai, masih ada rintangan lain yang tidak dapat ditangani oleh defendan. Seksyen 42(2)(b)(viii) Enakmen 1989 menghendaki Mahkamah Tinggi Syariah dalam bidang kuasa sivilnya mendengar dan menentukan segala tindakan dalam mana semua pihak adalah beragama Islam dan yang berhubung dengan 'pembahagian dan pewarisan' (division and inheritance) harta pusaka tidak di bawah wasiat. Tuntutan plaintif bukanlah untuk 'pembahagian dan pewarisan'. Ia merupakan satu tuntutan untuk pampasan terhadap aset peribadi defendan yang telah dibelikannya dengan persumberan yang diperolehi daripada harta pusaka tidak di bawah wasiat yang telah dilupuskannya tanpa diberikuasa pada tahun 1950 (lihat ms 745F–H, I–746A).

(4) Seksyen-seksyen 31, 35 dan 46 Enakmen 1989 mengiktiraf bahawa bidang kuasa Mahkamah Syariah dan mahkamah sivil, jauh dari bersifat saling eksklusif, sebenarnya bersifat simbiotik memandangkan mereka merupakan satu saluran di mana pendapat mufti atau Mahkamah Syariah boleh dijalankan secara berkesan oleh mahkamah sivil yang bertindak dalam lingkungan bidang kuasanya. Perkara 121(1A) Perlembagaan tidak menyebut dan tidak seharusnya difahami sebagai menyatakan bahawa semua pertikaian dalam mana semua pihak beragama Islam harus didengar di Mahkamah Syariah sahaja (lihat ms 747G–I).

(5) Sudah tentu persoalan mengenai bidang kuasa hendaklah diputuskan pada mulanya di dan oleh mahkamah di mana tindakan tersebut difailkan. Sebarang cadangan bahawa mahkamah tidak berbidang kuasa mestilah dibangkitkan secepat mungkin. Melainkan ia amat ketara bahawa mahkamah sivil tidak pernah mempunyai bidang kuasa sama sekali disebabkan perkara 121(1A) Perlembagaan, dalam satu kes sivil sesuatu pihak tidak harus dibenarkan berhujah di tahap rayuan bahawa mahkamah permulaan tidak mempunyai bidang kuasa (lihat ms 748B–C).]

Notes

For cases on jurisdiction of High Court, see 8(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 480–481.

Cases referred to

Dalip Kaur v Pegawai Polis Daerah, Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)

Harrison's Share, Re [1955] 1 Ch 260 (refd)

Myriam v Mohd Ariff [1971] 1 MLJ 265 (refd)

Legislation referred to

Administration of Islamic Law Enactment (Selangor Enacment No 2 of 1989) ss 31, 35, 42(2)(b)(vii), 43, 46, 87
Administration of Muslim Law Enactment (Selangor Enacment No 3 of 1952) ss 43, 44, 45(1), (3)(b)(v), (6), 47, 79(1), Part III
Court of Appeal Rules 1994 r 18(4)(d)
Courts of Judicature Act 1964 s 2, Schedule
Federal Constitution art 121(1A)
Guardianship of Infants Act 1961
Rules of the High Court 1980 O 59 r 19
Syariah Civil Procedure Code Enactment (Selangor Enactment No 7 of 1991)
Trustee Act 1949 ss 2, 3

KS Narayanan (*T Gunaselan* with him) (*A Zahari Kanapathy Thulasi*) for the plaintiff.

Hj Sulaiman Abdullah (*KS Lopez* with him) (*Kamaruddin & Partners*) for the defendant.

Mahadev Shankar J:. After a very lengthy trial, I gave judgment against the defendant and ordered him to pay the plaintiff RM679,330.49 with interest thereon and costs. In a nutshell, this is why. The late Ainuddin ('the deceased') had two wives, three sons and three daughters. The defendant is his eldest son. In fraud of these daughters, of whom the plaintiff was one, and in fraud of the High Court Malaya, the defendant wilfully suppressed the existence of the three daughters as beneficiaries of his father's estate when applying for letters of administration in 1947 and when obtaining the distribution order made on 31 October 1949 ('the distribution order'). In the manner described in my earlier judgment, the defendant and his brothers arranged matters between them so that they ended up owning all the deceased lands between them. This result was fully achieved by 28 November 1950.

The fraud was only discovered much later. By then the defendant had already sold that portion of the land he acquired from his father's estate, and invested the proceeds in other property.

This action was filed on 21 June 1991. It was filed against the defendant personally. The cause of action pleaded was that the defendant had committed an actionable fraud by deceiving the court into believing that the plaintiff did not exist, and then fraudulently disposing the deceased's properties in such a manner as to defeat the legitimate rights of the plaintiff. Since the original properties had all been distributed, the relevant prayers were for damages and also for such further or other relief as the court was disposed to grant.

Immediately after the filing of the action, the plaintiff obtained an injunction to prevent the defendant from concluding a sale of some land in Batang Kali. By agreement of the parties however, the land was sold but the defendant's share of the proceeds was deposited in court to await the outcome of this action.

The defence raised factual issues and also the equitable defences of laches and limitation. Never for a moment was it suggested that the court had no jurisdiction to entertain this claim.

After the decision was given against him on 27 October 1994, the defendant filed a notice of appeal on 31 October 1994. He then filed a motion for stay of execution on 15 November 1994. This, I allowed in part on 21 December 1994 when I directed that RM300,000 be paid to the plaintiff, RM75,000 be put on a monthly fixed deposit, and the balance on three monthly fixed deposits. The Court of Appeal heard this application on the 12 December 1994 and directed the RM300,000 to be put on fixed deposit with the Senior Assistant Registrar Shah Alam.

The appeal record was filed on the 1 April 1995. Contrary to r 18(4)(d) of the Court of Appeal Rules 1994, the appeal record did not contain a copy of the order appealed from. The draft order had not been extracted. But when he first applied for a stay, the defendant swore that he would diligently prosecute the appeal. The memorandum of appeal was filed on 1 April 1995. Various grounds were advanced attacking my judgment. Want of jurisdiction is not one of them. So this could not have been the reason why the order was not extracted at the time. The appeal was fixed for hearing at the sitting commencing on 11 September 1995. It was actually heard on 13 September.

On 8 September 1995, the defendant/appellant's solicitors gave written notice for the first time that they proposed to submit at the hearing of the appeal 'that this matter is outside the jurisdiction of the High Court of Malaya pursuant to art 121(1A) of the Federal Constitution ('the Constitution') but is instead within the ambit of the Syariah Court.' Their letter continues:

> We therefore give you notice that it is our intention to raise this point before the Court of Appeal, ie that neither the High Court nor indeed the Court of Appeal has jurisdiction in this matter, and that therefore the appeal should be allowed and the plaintiff/respondent be instructed to seek any remedy before the Syariah High Court.

When the Court of Appeal was appraised of this objection, 'the appeal was adjourned to enable the appellant to go back to the trial judge within two weeks to argue the issue of jurisdiction. It was ordered that the draft order of the High Court be not perfected until after the issue was decided.

In this way, the matter came once again before me without even the order made by the Court of Appeal being extracted, and the appellant/defendant's counsel submitted that I should declare that this court never had any jurisdiction to entertain this action in the first place by reason of art 121(1A) of the Constitution, which reads:

> The courts referred to in cl (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

This article was inserted into the Constitution by the Constitution (Amendment) Act 1988, which came into force on 10 June 1988.

Syariah Courts were first established in the State of Selangor by the Administration of Muslim Law Enactment Selangor No 3 of 1952 ('the 1952 Enactment'). Sections 43 to 45 in Part III of the 1952 Enactment (which covers religious courts) came into effect only on 1 July 1953. These sections deal with the establishment of the courts of the kadi besar and the kadis, and the limits of their jurisdiction (see *Sel GN* 1102/52; 83/53; and 504/43). Whether a matter came within the jurisdiction of the Syariah Courts in Selangor has to be determined by a consideration of this Enactment and its successor.

Letters of administration to the estate of the deceased were applied for and extracted under the Probate and Administration Enactment Cap 8 of the Laws of the Federated Malay States; as was the distribution order. In my earlier judgment, I held that the court made the distribution order acting on the appellant's fraudulent misrepresentation on the oath that he had no sisters. The defendant knew that by Syariah Law as stated in the kadi's certificate, the sisters were entitled to share in the estate. But the distribution order proceeded on the basis that the estate be divided allegedly according to Muslim Law only amongst the two wives and three sons.

It is trite law that a final order of the High Court made in the proper exercise of its jurisdiction remains valid until it is set aside. Where such an order is obtained by a fraud, a fresh action must be brought to have that order set aside. This was the whole basis of the cause action in this case. Under the letters of administration, which the defendant was quite entitled to obtain as the deceased's eldest son, it was his duty to distribute it to the legal beneficiaries in their appropriate shares. He did not and thus became an administrator *de son tort*. It was proven to my satisfaction that the distribution order aforesaid was obtained by fraud. I so held in my judgment. The relief granted was consequential upon this finding. I think it correct to say that where an order of the High Court has been obtained by fraud, it is within the exclusive jurisdiction of this court to declare that to be so. The Syariah Court is not vested with the jurisdiction to set aside orders made by the High Court.

As indicated earlier, the 1952 Enactment came into force only in 1953. By that date, the whole of the estate of the deceased had already been distributed by the defendant in a two stage operation. First, he transmitted the titles to himself as administrator. Then he transferred the lands to him and his brothers purportedly for valuable consideration. In fact, according to him there was no consideration (yet another deception for questionable motives. Were they trying to hold themselves out that they were purchasers for value without notice of the defect in title?).

This action was not brought against the defendant in his capacity as administrator. It was brought against him for damages and restitution in his personal capacity for his tortuous acts in converting his sister's property to his own use, thereby committing a breach of trust. In the Trustee Act 1949 ('the Act'), s 2 specifically applies the Act to administratorships constituted or created before or after the commencement of the Act on the 31 December 1949. The 'court' vested with jurisdiction to deal with breaches of trust by s 3 of the Act is the High Court of Malaya.

The specific provisions of the 1952 Enactment relevant to the appellant's belated submission are ss 45(1), (3)(b)(v), (6) and 79(1) which read:

> 45 (1) The court of the Kathi Besar shall have jurisdiction throughout the State and shall be presided over by the Kathi Besar or Timbalan Kathi Besar.
>
> (3) The court of the Kathi Besar shall —
>
> (b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties profess the Muslim Religion and which relate to —
>
> (v) determination of the persons entitled to share in the estate of a deceased person who professed the Muslim religion, or of the shares to which such persons are respectively entitled,
>
> (6) Nothing in this Enactment contained shall affect the jurisdiction of any Civil Court and, in the vent of any difference or conflict arising between the decision of a court of the Kathi Besar or a Kathi and the decision of a Civil Court acting within its jurisdiction, the decision of the Civil Court shall prevail.
>
> 79 (1) No person except a lawfully appointed administrator or an executor who has proved the will shall represent or act on behalf of the estate of a deceased person:
>
> Provided that a beneficiary may claim his share of the estate of a deceased person against any person unlawfully in possession of any assets of the deceased.

The problem here was that before the Court of the Kadi Besar even came into existence, the civil court had already decided and distributed the estate of the deceased. It was therefore incumbent upon the plaintiff to attack the validity of the distribution order in order to obtain personal relief against the defendant for his tortuous acts against her.

It must be emphasized that it was in the express contemplation of the 1952 Enactment that letters of administration had to be applied for in the Civil High Court. This was so because the 1952 Enactment did not empower the Syariah Court to grant letters of administration. Its jurisdiction under s 45(3)(b)(v) was confined to the determination of the persons entitled to share in the estate. In the nature of things, such jurisdiction would only have been exercised when there was a dispute. In the present case, the Kadi Besar had already issued his certificate (Faraid) and nobody had disputed that it correctly stated the shares to which the heirs of the deceased were respectively entitled under Muslim Law.

This action was filed on 21 June 1991. Part III of the 1952 Enactment was repealed by s 87 of the Administration of Islamic Law Enactment Selangor No 2 of 1989 ('the 1989 Enactment'). The 1989 Enactment only came into force on 1 September 1991 (see Selangor Government Gazette PU 58 dated 15 August 1991). It has not been suggested that the 1989 Enactment was intended to have retrospective effect.

Section 42 of the 1989 Enactment is comparable to s 45 of the 1952 Enactment. The relevant portions read:

A 42 Jurisdiction of Syariah High Court

(1) A Syariah High Court shall have jurisdiction throughout the State of Selangor and shall be presided over by a Syariah High Court Judge.

(2) A Syariah High Court shall —

(b) in its civil (*Mal*) jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to —

(viii) division and inheritance of will or non-will property; or

(ix) other matters in respect of which jurisdiction is conferred by any written law.

Section 45(3)(b)(v) of the 1952 Enactment is very differently worded from s 42(2)(b)(viii) of the 1989 Enactment. Whereas the 1952 Enactment was confined to the determination of the identity of the beneficiaries and the quantum of their respective shares in the deceased's estate, s 42(2)(b)(viii) of the 1989 Enactment extended the jurisdiction to the division of the property itself. Section 45(6) of the 1952 Enactment was omitted altogether from the 1989 Enactment.

The day the 1989 Enactment came into force, another Enactment also came into being. This was the Syariah Civil Procedure Code Enactment (Selangor Enactment No 7 of 1991) ('the Code'). Under the 1989 Enactment, 'Court' (in the present context) means Syariah High Court, and under the Code, 'Court' has the same meaning. Part XXVI of the Code now provides for executors and administrators and specifically confines the meaning of 'administrator' to 'an administrator appointed by the Syariah Court'. A comparison of the 1989 legislation with the 1952 Enactment makes it clear that under the 1952 Enactment, the Syariah Court did not seek to assume jurisdiction to grant letters of administration. By s 47 of the 1952 Enactment, the Court of the Kadi Besar was entitled upon application of any beneficiary to give an inheritance certificate setting out the share he was entitled to, and that is what in effect happened in this case.

In my opinion, the 1989 Enactment has no application to the action heard by me which was properly filed before it came into force. But even on assumption that the 1989 legislation applied, there are other hurdles which the appellant cannot surmount. Section 42(2)(b)(viii) of the 1989 Enactment requires the Syariah High Court in its civil jurisdiction to hear and determine all actions in which all the parties are Muslims and which relates to 'division and inheritance of non-will property'. This, must in the circumstances, refer to actions for the division of property commenced after the coming into force of the 1989 Enactment. Sarwari's claim was not for 'division and inheritance'. It was a claim for compensation against the defendant's personal assets which he had bought with resources obtained from non-will property he had wrongfully disposed of in 1950.

The defendant/appellant's counsel submitted that even though the 1989 Enactment had not come into force when this action was filed, it was incumbent upon this court to stop the case and send it back to the Syariah Court. As I have already said earlier, neither art 121(1A) of the Constitution nor the 1989 Enactment which only came into force on 1 September 1991

is invested with retrospective effect. If the defendant/appellant's submission is correct it will have the absurd effect of nullifying all probate and letters of administration granted by the civil court between 10 June 1988 when art 121(1A) of the Constitution came into force and 1 September 1991 when the 1989 Enactment and the Code were brought into effect for the first time. This cannot be right simply because the limits of a court's jurisdiction must be determined by the relevant statutes in force at the material time.

It was submitted by appellant's counsel that art 121(1A) of the Constitution was precipitated by *Myriam v Mohd Ariff* [1971] 1 MLJ 265. Be that as it may, it is to be noted that the case deals with an issue of custody, and the parallel jurisdictions of the High Court under the Guardianship of Infants Act 1961 and the Kadi's court in Petaling Jaya. The Constitutional Amendment was passed nearly eighteen years later. It is not very happily worded and there are difficulties inherent in its application.

Mr Narayanan submitted that the word 'matter' by statutory and judicial definition only 'includes every proceeding in court not in a cause' (see s 2 of the Courts of Judicature Act 1964 ('the CJA') and *Words and Phrases — Legally Defined* (Butterworths, 1969). So it was submitted that an action filed in the High Court could never be a 'matter' within the jurisdiction of the Syariah Court. With respect, I cannot agree with such a restrictive interpretation.

A purposive approach requires us to treat any such 'matter' as being a matter which falls within the purview of ss 42 and 43 of the 1989 Enactment in Selangor and its equivalent legislation in the other states of Malaysia. That the problem does not and there as is amply demonstrated by:

(a) *Ng Wan Chan v Majlis Ugama Islam Wilayah Persekutuan & Anor (No 2)* [1991] 3 MLJ 487 where the High Court claimed jurisdiction to decide whether or not the deceased was a Muslim at the time of his death.

(b) *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman & Satu Yang Lain* [1992] 2 MLJ 244 where the Supreme Court held that the issue of a Muslim defendant's right to demolish a mosque and erect a commercial property in its place and whether he was susceptible to an injunction was a matter within the jurisdiction of the Civil Court since only the High Court could grant such injunction under part III of the Specific Relief Act 1950.

(c) *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1, a Supreme Court decision which concerned the application by Dalip Kaur that her son was not a Muslim at the time of his death. At the first hearing the Judicial Commissioner decided that he was Dalip Kaur appealed. The Supreme Court remitted the case to the High Court and directed that a fatwa be obtained. The Judicial Commissioner did this and then reconfirmed his decision. Dalip Kaur appealed again. The Supreme Court dismissed the appeal. Mohamed Yusoff SCJ ruled that the entire matter should have been disposed of in the first instance by the Syariah Court since the question as to whether the deceased had renounced Islam was eminently a matter for the Syariah Court. Having so held, Mohamed Yusoff SCJ also held as follows:

'However, all parties concerned had consented to the reference of certain questions to the fatwa committee for determination, and the judicial commissioner, after receiving the fatwa from the fatwa committee, had confirmed his earlier findings. On this basis, the appellant's application to reopen the case on different issue cannot be allowed. The fatwa issued by the committee is clear and should be adhered to as it had been sought by the parties.'

It was not suggested that because art 121(1A) applied the High Court had no jurisdiction at all *ab initio* and that its decision was a nullity.

(d) *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 where the Supreme Court held that a claim for relief by a Muslim wife arising out of assault and battery committed upon her by her Muslim husband was a matter for the Syariah Court alone to decide. Sections 107, 127 and 128 of the Islamic Family Law (Federal Territory) Act 1984 completely covered all the complaints being made by the wife. The Supreme Court held that any challenge to jurisdiction must be determined by deciding whether the Syariah Court had jurisdiction. The Supreme Court overruled *Shahamin Faizul Kung bin Abdullah v Asma bte Haji Junus* [1991] 3 MLJ 327 on the High Court's interpretation of s 4 of the Courts of Judicature Act.

(e) *G Rethinasamy lwn Majlis Ugama Islam, Pulau Pinang dan satu yang lain*[1993] 2 MLJ 166. Here the applicant was not a Muslim, but the matter involved Muslim law. The court declined an application to have the matter moved to the Syariah Court.

The common thread that runs through all these decisions is this. Where all the parties are Muslim, and it is clear the substantial issue to be decided in a case filed in the civil court falls entirely within the jurisdiction of the Syariah Court, the civil court should not entertain the matter further. As the law now stands, the civil court can only dismiss it and leave it to the plaintiff to file the matter in the Syariah Court, because in the CJA, a 'court' does not include the Syariah Court, and a transfer is not possible under art 12 of the additional powers spelt out in the Schedule.

Where the substantial issue to be tried falls within the jurisdiction of the civil courts, but there are collateral issues which must be decided in accordance with principles of Islamic Law, the matter should be resolved by that route which will produce the quickest and most effective resolution of the dispute. It is to be noted and emphasized that ss 31, 35 and 46 of the 1989 Enactment expressly recognize that disputes may well arise in the civil courts in which questions of 'hukum syarak' call for a decision.

These sections recognize that the jurisdiction of the Syariah Court and the civil courts, far from being mutually exclusive, are in fact symbiotic since they provide the machinery whereby the opinion of the Mufti or the Syariah Court can be effectively implemented by the civil court acting within its jurisdiction. With the greatest respect to all concerned, art 121(1A) of the Constitution does not say and should not be understood to mean that all disputes in which all the parties are Muslim should only be heard in the Syariah Court. I doubt if such a suggestion would have been made if the issue was one involving mercantile or corporate law. As appears from a general consideration of s 42 of the 1989 Enactment, what it only intended

to cover was application of the Personal Law of the Muslims by Muslims to Muslims. Issues involving the application of such personal law may well arise in the trial of an action which a civil court may otherwise be perfectly competent to try. Such issues will constitute matters within the jurisdiction of the Syariah Court, whose opinion will be conclusive.

Inevitably the question of jurisdiction has to be decided in the first instance in and by the court where the action has been filed. Any suggestion that the court does not have jurisdiction must be raised at the earliest possible opportunity. Consideration may be given to whether art 12 of the Schedule to the CJA should be amended so that the civil court is empowered to transfer cases or specific issues within the jurisdiction of the Syariah Court to that court for determination. Unless it is manifestly obvious that the civil court never had any jurisdiction at all by virtue of art 121(1A) of the Constitution, it is my view with respect to all concerned that in a civil case a party should not permitted to argue at the appellate stage that the court of first instance did not have jurisdiction. The concept that consent cannot confer jurisdiction should have very limited application in a civil case tried in the High Court whose jurisdiction is original and therefore bearing its own authority and not derived from some outside source.

When this trial began and the plaintiff and her witness indicated they wished to swear on the Koran, I offered to step down and let them take this matter further in the Syariah Court. Counsel for both parties insisted I continue. Now defendant's counsel says nobody thought about the jurisdiction point at the time! Whether we should follow Yusoff Mohamed SCJ in *Dalip Kaur v Pegawai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 and preclude this point from being argued further on appeal is of course a matter for the appellate court. Let it not be overlooked that the decision given by me implemented the opinion given by the Kadi Besar of Selangor given in his Faraid on 29 December 1947, as confirmed by PW8 Haji Asmoni bin Haji Sidek.

The divine command that 'judges are to render back their trusts to those to whom they are due, and when judging between mankind to judge with justice' is of universal application. Article 121(1A) of the Constitution cannot be viewed in isolation. Taken together with arts 3 and 11 of the Constitution, its obvious objective was to stabilize a significant area of our search for a national identity by cementing mutual respect for each others' religious beliefs. The civil courts and the Syariah Courts each acting within its jurisdiction, are partners in the search for justice which should be speedily and effectively provided to the aggrieved. Both courts should be wary of any belated attempt to use the judicial machinery of the one to frustrate a pursuit of justice in the other.

Both parties have invited my attention to *Re Harrison's Share* [1955] 1 Ch 260, and say that since my earlier order has not been perfected, I am entitled to alter it in any way I think fit to give effect to my decision. For the avoidance of any doubt, I now declare the distribution order obtained by the defendant to be a nullity and obtained in fraud of the court and the

daughters of the deceased. I do not need to make any order as to the validity of the letters of administration taken out by the defendant and the bond signed by him. They impose legal duties on him which he failed to discharge. I reaffirm the earlier order I made as to the monetary payments and costs required to be made to the plaintiff. I dismiss the suggestion that this court did not have jurisdiction to deal with this matter.

I certify, as provided by O 59 r 19 of the Rules of the High Court 1980, that there be fees for two counsel. I now invite further submissions on the basis which the costs of this application should be paid by the defendant to the plaintiff (ie on an indemnity basis or on a solicitor and client basis or such other basis as is appropriate to the circumstances of this case).

Order accordingly.

Reported by Jafisah Jaafar